FILE COPY

DEC 10 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 241

CONWAY C. CRAIG, BOB MCCRACKEN, and TOM MULVANY,

Petitioners,

VS.

JOHN B. HARNEY, SHERIFF OF NUECES COUNTY, TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR THE PETITIONERS

MARCELLUS G. ECKHARDT,
CHARLES L. BLACK,
IRELAND GRAVES,
Counsel for Petitioners.

INDEX

		Pages
I.	Report of Opinion Below	1
II.	Jurisdiction	1
III.	Statement of the Case	3-21
	(a) Forcible Detainer Case (Jackson v. Mayes)	4-8
	(b) Contempt Proceedings	8-21
	(1) Judgment *Nisi*	9-19
	(2) Final Judgment of Contempt	19-20
	(3) Judge Browning's View	20
IV.	Specification of Errors	21
V.	Summary of Argument	22
VI.	Argument	23-51
	Point 1.—Petitioners have been deprived of their right of freedom of the press, in that, under the guise of applying the "clear and present danger" test, the court below has applied the "tendency" test and the theory of Toledo Newspaper Company v. United States, 247 U. S. 402	23-28
	Point 2.—There was no contempt of court since the publications created no clear and present danger of coercing a judge of reasonable fortitude	29-35
	Point 3.—Petitioners having been convicted of contempt "by means of" allegedly false news reports, they presented a complete defense by showing that the news accounts were essentially true	35-50
	Here the specific charges of False Reporting are answered from the Record	38-48
	Point 4.—Punishment was imposed, at least in part, for scandalizing the court. This vitiates the entire udgment. Thomas v. Collins, 323 U. S. 516, 529	50-52
VII.	Conclusion	52
VIII.	Appendix A. Editorial complained of	54
IX.	Appendix B. Part of Opinion dealing with Editorial	57
X.	Appendix C. Statement made by Editor McCracken at end of contempt hearing	58
XI.	Stipulation	60

AUTHORITIES

	Pages
United States Constitution:	
1st and 14th Amendments	21, 22
United States Statutes:	
Section 237(b) of the Judicial Code, as amended, 28 U.S.C. Section 344(b)	1
Texas Constitution:	
Art. 5, Sec. 3	2
Art. 5, Sec. 5	2
Texas Statutes:	
Art. 1737, Revised Civil Statutes of 1925	2
List of Cases:	
Benavides v. Hunt, 79 Texas 383	49
Bridges v. California (Times-Mirror Co. v. Superior Court), 314 U. S. 252 (1941)	21, 22, 25, 27, 28, 31, 34, 35, 50, 52
Cole v. Johnson, 120 Iowa 667	49
Craig v. Hecht, 263 U. S. 255	24, 52
Creamery Dairy Co. v. Elec. Park Co., 138 S. W. 1106	49
Ex parte Craig, et al., 193 S. W. (2d) 178	1
Ex parte Murray Jackson, 113 Texas 58	2
Ex parte Miller, 91 Tex. Cr. Rep. 607, 240 S. W. 944	2
Gordon v. Richardson, 185 Mass. 492	49
Gray v. Vogelsang (Tex. Civ. App.), 236 S. W. 122 (1921)	49
Mactier v. Osborn, 146 Mass. 399	49
Nye v. United States, 313 U. S. 33	28
Patterson v. Colorado, 205 U. S. 454	24
Pennekamp v. Florida (No. 473, October Term, 1945, decided June 3, 1946), 66 S. Ct. 1029, 90 L. Ed., Adv. Op. 1001	21, 22, 27, 29, 34, 50
Randolph v. Mitchell (Tex. Civ. App.), 51 S. W. 297	49
Thomas v. Collins, 323 U. S. 516	2, 23, 52
Toledo Newspaper Co. v. United States, 247 U. S. 402	23, 24, 26, 27, 34, 35, 52
Waggoner Estate v. Sigler Oil Co., 118 Tex. 509	49
Other Authorities:	
Nelles and King, Contempt by Publication, XXVIII Columbia Law Review, at pages 552, 553	31

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 241

CONWAY C. CRAIG, BOB MCCRACKEN, and TOM MULVANY,

Petitioners,

VS.

JOHN B. HARNEY, SHERIFF OF NUECES COUNTY, TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR THE PETITIONERS

I.

Opinion Below

The opinion below (R. 418) is unofficially reported, *Ex parte Craig, et al.*, 193 S. W. (2d) 178.

II.

Jurisdiction

The jurisdiction of the Court is invoked under Section 237(b) of the Judicial Code, as amended; 28 U.S.C. Section 344(b).

The judgment of the Court of Criminal Appeals of Texas to be reviewed was entered on February 13, 1946 (R. 499). Rehearing was denied on April 3, 1946 (R. 457).

Petition for certiorari was filed June 28, 1946, and granted October 14, 1946.

No right of appeal is afforded by Texas law from a judgment of contempt of court. The only available method of obtaining relief is by applying for writ of habeas corpus in an original proceeding. *Ex parte Miller*, 91 Tex. Cr. Rep. 607, 240 S. W. 944. In *Thomas v. Collins*, 323 U. S. 516, the petitioner had been held guilty of contempt for violating an order of the district court "in a civil cause." This enabled him to apply to the Supreme Court of Texas for writ of habeas corpus. Here the petitioners were not so charged, and the Texas Supreme Court had no jurisdiction to grant the writ. *Ex parte Murray Jackson*, 113 Tex. 58.* They applied to the Court of Criminal Appeals whose jurisdiction to issue the writ of habeas corpus, conferred by the Texas Constitution, Art. V, Sec. 5, is illimitable by statute. *Ex parte Miller*, 91 Tex. Cr. Rep. 607, 240 S. W. 944. As the

---

*The Texas Constitution provides: "The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law." Art. V, Sec. 3.

The statute provides: "The Supreme Court or any of the Justices thereof, either in term time or in vacation, may issue writs of habeas corpus in any case where any person is restrained in his liberty by virtue of any order, process or commitment issued by any court or judge on account of the violation of any order, judgment or decree theretofore made, rendered or entered by such court or judge in any civil cause." Art. 1737, Revised Civil Statutes of 1925.

Court is aware, the Texas Court of Criminal Appeals is a court of last resort in all causes within its jurisdiction.

III.

Statement of the Case

By a judgment of the Court of Criminal Appeals of Texas petitioners were denied writs of habeas corpus and remanded to custody of respondent as sheriff of Nueces County, Texas, to serve three days in jail for constructive contempt of court adjudged by the county court of Nueces County. (R. 449.) Issuance of the mandate was stayed pending final action by this Court. (R. 458.)

Petitioners, Craig, publisher; McCracken, managing editor; and Mulvany, news writer, of daily newspapers published in Corpus Christi, Texas, were held guilty of contempt for publishing certain news accounts and an editorial concerning the trial of a forcible detainer suit (Jackson, et al. v. Mayes, et al.) in the county court of Nueces County. The morning Corpus Christi Caller, the afternoon Corpus Christi Times, and the Sunday Caller-Times are owned and published by the Caller-Times Publishing Company, a corporation, not a party.

No question of interfering with jury trial is involved. The charge is that the publications were intended and calculated to scandalize the judge and influence him in ruling upon the motion for new trial after he had directed a verdict for the plaintiff. Hence there was pending before the county judge the review of law questions.

In the judgment of contempt the judge found, *inter alia*, that the reports and editorial, "by reason of" inaccuracies, omissions, emphasis, and inclusion of foreign matter, were of a nature calculated to reflect upon the integrity of the court, and to "coerce and compel a judgment contrary to the law and the evidence in said cause." (R. 81.) Judge Beauchamp, dissenting, in the Court of Criminal Appeals, held that the finding was without support in that the judgment in the detainer suit was itself contrary to law. (R. 114.) This point aside, we think that the Court will be aided by viewing, at least in outline, the forcible detainer trial, from which the contempt charges emerged.

The Forcible Detainer Case, Jackson v. Mayes

Mayes, defendant, held a lease of a portion of a building in Corpus Christi, expiring March 14, 1945, with an option for an additional year at a monthly rental of $275, an increase of $25. The original covenant for rent provides that "said rentals shall be payable in advance on the first day of each month during the terms and continuance of this lease in monthly instalments of $250 at the office of the lessor in said building together with interest at the rate of 10% per annum on past due instalments until paid . . ." (R. 238.) The option provision reads: "10. Lessee has option to rent for $275.00 per month, all terms and conditions remaining the same, for one additional year." (R. 240.) The significance will later appear of the next succeeding provision, as follows: "11. In the event of the sale of the building

Lessee agrees to surrender his lease at the option of the purchaser, on or after March 14, 1944." (R. 240.)

The premises were not sold, and Mayes desired to exercise his option. But because he failed to pay $275 by March 14, 1945, as rent for the first month, Judge Browning ruled that he had failed to exercise his opinion. (R. 219.)

Mayes left Corpus Christi for Camp Hood (some 300 miles distant) on January 17, 1945, and was there inducted into the Army two days later. He had committed his business to Burchard by a power of attorney. Burchard, not knowing that the lease called for an increase in rent, sent to Jackson on March 14, 1945, a check for $250 as rent for the first month of the extended term. The check was retained by Jackson without word of any kind to Burchard until March 19th, when an attorney for some of the lessors informed him that the lease called for $275 monthly rental, and that Mayes had lost his rights. The $250 check was on that day returned to Burchard by the attorney with a letter requesting surrender of possession. (R. 261.) On March 21st, the day after receipt of the letter, Burchard forwarded to Jackson by mail a check for $275 with notation indicating that it was rent to April 14, 1945, and by inadvertence he dated the check April 21, not March 21, 1945. (R. 263-264, 273.) After Jackson had retained the check for three weeks, it was mailed back to Burchard on April 13, 1945 by the attorney who, on April 20, 1945, filed the suit for possession. (R. 203.) Defendant tendered the rent due to date in the justice court, and in the county court (R. 283).

The owners of the building (Jackson, Flato and Heaney) from whom Mayes held his lease, six months prior to that time had leased the building (including the Mayes portion) to one Mason for a term of five years beginning October 1, 1944. The lease was made expressly subject to the Mayes lease, but Mason thereby became entitled to receive the Mayes rents, and the original lessors thenceforth were not affected by, or interested in, what Mayes did about his option (R. 341).

Mayes, however, was not informed of the lease to Mason. Jackson continued until March 1945 to accept the Mayes checks, which he endorsed for deposit, as before, to his own credit in the bank (R. 251) and then accounted to Mason. (R. 345.)

About the last of February, 1945, Burchard was informed by Mason that he had "gotten possession" of the property. To Burchard's statement, "Well, we would like to stay on," Mason replied: "No, we have to have the use of it." (R. 352.) By this he must have intended to inform Burchard that he had bought the property, since otherwise he had no right to demand possession. Burchard understood that if Mason had bought the building Mayes had no option, but he doubted Mason's statement, and for two weeks he endeavored to find Jackson and to get a copy of the Mayes lease in order to ascertain more definitely his rights. Jackson's office reported that he was out of town, and Burchard, on March 14, 1945, forwarded to Jackson the usual rent check. (R. 270.)

Mayes operated in the premises what he called the

Playboy Cafe, where he sold beer and "some food." (R. 228.) Plaintiff's counsel referred to it as a beer saloon (R. 228.) Mason was a more extensive operator. Former proprietor of the Dragon Grill, he was interested in a so-called novelty company, operating cigarette machines, phonographs, marble tables ("without the pay-off"), and at an earlier period, slot machines. (R. 354-355.) He testified that he was also in the real estate business.

Late Saturday afternoon, at the end of two days in trial of the detainer suit, Judge Browning directed the jury to return a verdict for plaintiff, and for that purpose handed them a form to be signed by the foreman. The jury soon returned with a verdict for defendant. (R. 214.) The judge sent them back with a second peremptory instruction and form of verdict Again they returned, repeating what they had done, adding: "Unanimous verdict on first ballot, in favor of the defendant." (R. 216.) Again the judge sent them back, with an attempted explanation that in the circumstances the jury was in duty bound to follow instructions. This was about 9:30 p.m. A short time later the judge, having ascertained that the jury were not ready to comply, recessed the court until Sunday morning, and the jury retired for the night in charge of the bailiff. At 9 o'clock Sunday morning the jury again reported noncompliance. The judge then threatened to keep them in custody until they obeyed, whereupon counsel for defendant in open court thanked them for what they had done, and advised them of the futility of holding out longer. Shortly they brought in a verdict for plaintiff stating

that it was "with the orders of the court against the conscience of this jury." (R. 218.)

Although in the charge of contempt complaint was made of the press account of the above mentioned remarks of counsel to the jury (R. 13), the parties stipulated at the contempt trial (R. 217) that this and other proceedings, above outlined, as they occurred Saturday evening and Sunday morning were correctly reported in the papers of Sunday and Monday morning. That is, in the Caller-Times of Sunday, May 27, 1945 (R. 362-364), and in the Caller of Monday, May 28th (R. 371-384).

On May 29th, motion for new trial was filed (R. 208) and, after argument pro and con, was overruled on June 6, 1945 (R. 209). The Jackson-Mayes detainer suit was thus finally disposed of before the contempt matter was heard.

Contempt Proceedings

Meanwhile, on June 4, 1945, the complaint was filed charging contempt of court (R. 12), and on the same day (R. 19) the county judge entered an order, in form of a judgment *nisi*, directing that petitioners be cited, by *scire facias*, to show cause on June 8, 1945, why the judgment *nisi* should not be made final. (R. 26.) The time having been extended, petitioners filed separate answers on July 24, 1945 (Craig, R. 27; McCracken, R. 43; Mulvany, R. 62.) After an interim between court terms the contempt trial began before Judge Browning on August 1, 1945, and was concluded and final judgment of contempt was rendered August 3, 1945 (R. 79). Later

on that day petitions for writs of habeas corpus were presented to the Presiding Judge of the Court of Criminal Appeals who, in vacation, granted bail on temporary writs made returnable to the Court at the October, 1945 Term. (R. 10-11.)

The affidavit by which the contempt proceeding was instituted, referred to in the record as the Complaint (R. 12), was embodied *in toto* on the same day in the following

Judgment *Nisi* (R. 19-27).

"This the 4th day of June, 1945, it appearing to the satisfaction of the court that from the affidavit of Newt Wright, an officer of this court, that Conway C. Craig, Bob McCracken and Tom Mulvaney, who reside in Nueces County, Texas, are guilty of contempt of this court in the following respects:

"That while this honorable court was in regular session, having been called on the 21st day of May, 1945, there was pending before the said court for judicial determination cause No. 3624, wherein B. M. Jackson, Franklin Flato, Frederick Flato and Harry G. Heaney were plaintiffs, and Joe L. Mayes, and F. F. Burchard were defendants; that said cause was on appeal to this honorable court by the defendants from a judgment for the plaintiffs in Justice Court for Place 2, Precinct 1, of this county, and came on trial de novo on the 25th day of May, 1945; and that the court did, after having impaneled a jury and heard the evidence on the said cause and on a motion of the plaintiffs, instruct the jury to return a verdict for the plaintiffs and against the defendants; and the jury having on the 27th day of May, 1945, pursuant to such instruction, returned the said verdict, the court rendered judgment for the plain-

tiffs, to which judgment the defendants did then and there in open court except; that on the 29th day of May, 1945, the defendants timely filed their motion for a new trial in said cause, and that said motion was set for hearing at 9 AM on the 6th day of June, 1945, and that said cause, at the time the hereinafter complained acts were done and this affidavit is made, is still pending before this court.

"Affiant would further show that he is interested in said cause by virtue of being an officer of the said court. Affiant would further show the court that on the dates hereinafter shown Conway C. Craig, publisher of the Corpus Christi Caller, the Corpus Christi Times, and the Corpus Christi Caller-Times, the first two named being daily newspapers of general circulation in the City of Corpus Christi and County of Nueces where the cause aforesaid is now pending, and the Corpus Christi Caller-Times being a Sunday newspaper of general circulation in the City and County aforesaid, together with Bob McCracken, an editorial writer, and Tom Mulvaney, a news writer, of the newspapers aforesaid, did knowingly and wilfully, without justification or excuse, when they could and should have done otherwise, write, publish and circulate, the hereinafter purported factual news stories and editorial comments.

"On the 26th day of May, 1945, in the Corpus Christi Caller, there was published a purported news story which included the statement

> 'that Burchard further claimed that although he had not known of the option clause, when he learned of it he immediately proffered a check for $275.00 rental';

that on the 27th day of May, 1945, in the Corpus Christi Caller-Times, there was written, published

and circulated a purported news story of proceedings had that included the following statement:

> 'At 7 PM Browning, without listening to argument from counsel for either side on the plaintiff's motion presented by Dudley Tarlton for Jackson, and without giving the Six-man jury opportunity to weigh the evidence, instructed the jury to find against Mayes. W. M. Lewright, Mayes' attorney, protested that the court's arbitrary action had ruled that Tarlton's "one-page motion" did not need supporting argument and citation of authorities';

"That on the 28th day of May, 1945, there was written, published and circulated in the Corpus Christi Caller an article which contained the following language:

> 'Browning accepted Tarlton's one-page motion, and without permitting argument or citation of authorities to support the motion, ruled that it be granted. The effect of this ruling was that Browning took the matter from the jury.'

"That said article also included the following speech made by Walter Lewright, of counsel for the defendants:

> 'However, I now advise you that under the law, Judge Browning has the right to compel you, even against the dictates of your conscience, to sign the verdict he has ordered. As a matter of fact, it is probable that he has the power to put you in jail until such time as you do sign it, and I rather imagine, from what has heretofore taken place in this trial, that unless you do

sign the verdict, he will cause you to be put in jail. As I and my clients feel that you have done all in your power to register your protest and revulsion of feeling at the effect of this decision reached by Judge Browning; as you are helpless to do anything further; and as making you suffer by remaining locked up will not do us a bit of good, I suggest that you sign the verdict and return to your homes with a clear conscience of having done all that you could to protect the rights of the man whom I feel, and evidently you feel, has been done a gross injustice.

'While we have no appeal from the court's decision in this case, we do have the right to appeal to his conscience by presenting a motion for new trial in this action—and which motion we will file and argue strenuously with the hope that in the meantime he will see the error committed and will rectify the same. There cannot be any doubt but that the action of you men in registering your protest against this decision, as you have done, will affect him. At least, I can only hope that it will. I sincerely thank you.'

"That on the 30th day of May, 1945, in an article written by the aforesaid Bob McCracken, and published and circulated in the Corpus Christi Caller under the editorial masthead, The Crow's Nest, there was contained the following language:

'Browning's behavior and attitude has brought down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such goings on; espe-

cially when a man in the service of his country seems to be getting a raw deal.'

"And further:

'Then the plaintiff's counsel offered a motion for an instructed verdict for his client. It was granted immediately, without having him cite his authority or without giving the defendant's attorney a chance to argue against it.

'That was the travesty on justice, the judge's refusal to hear both sides. That's where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high handed procedure in instructing a jury. It's no wonder that the jury balked and public opinion is outraged.

'The fact that a serviceman is involved lends drama to the event. But it could have happened to anyone, it can happen to anyone, with a layman sitting as judge in a case where the fine points of law are involved. True, the idea that only lawyers are qualified to occupy most public offices has been run into the ground, and in most instances, a competent layman would be better qualified, but the county judge's office is an exception. He should be a competent attorney as well as a competent businessman.

'It's a tragedy in a case of this sort that the court where the controversial decision was handed down in the court of last resort. It's too bad that appeal can't be made in a district court and heard by a judge who is familiar with proper procedure and able to

interpret and weigh motions and arguments by opposing counsel, and make his decisions accordingly.'

"And further:

'There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated.'

"That on the same 30th day of May, 1945, in the same issue of the Corpus Christi Caller, there appeared what purported to be a report of action taken by the Sailor's and Soldier's Advisory Council of Corpus Christi, the said action reported to have been the passage of a resolution

'labeling County Judge Joe D. Browning's order for a directed verdict against Mayes a "gross miscarriage of justice."'

"The said article further states that

'The council's resolution called on Browning to grant Mayes a new trial on the grounds that he had committed an error in instructing the jury to find for the plaintiff. The petition asked that Browning, upon granting the new trial, should disqualify himself to further sit as judge in the case, and should permit the case to be re-tried before another judge and jury.'

"And further:

"'The trial reached a climax Saturday night when Browning, on motion of Dudley Tarlton, Jackson's counsel, and without argument or citation of authorities, instructed the six-man County Court jury to find for Jackson. The jury twice refused,

both times bringing in verdicts in favor of Mayes and against Jackson. Browning had the jury confined to the courthouse jury room all Saturday night. Sunday morning when the court convened, the jury reported that it still had not signed the verdict in favor of Jackson. Browning announced that he would lock the jury up until Monday morning. However, Walter M. Lewright, advised the jurymen, that they should not continue to "suffer" any longer, and should sign the verdict, since Browning had a legal right to force them to do so. The jury signed the verdict, but appended a statement asserting that they did so under pressure.'

"That on the 31st day of May, 1945, there was written, published and circulated by the persons aforesaid in the Corpus Christi Caller a purported news story, which said:

'Three local groups were reported to be preparing petitions requesting County Judge Joe D. Browning to grant Pvt. Joe L. Mayes a new trial in the Playboy Cafe suit.

'One petition is reportedly being drawn by a parents and teachers' group, another by a service mothers' group, and the third is being drawn for independent circulation among parents of men in service.

'The new petitions are said to follow the general outline of a petition adopted by the Corpus Christi Soldier's and Sailor's Advisory Council Tuesday night. This petition called on Browning to grant a new trial and upon doing so to disqualify himself and permit the trial to go on under an-

other judge and jury. Action on the petitions is expected shortly.

'The council's petition, drawn by five veterans' organizations with a membership of more than 1,000, followed by a few hours the filing of a motion for new trial by Walter M. Lewright and LeGrand Woods, Mayes' counsels.'

"The article also contained the following language:

'It came to a climax Sunday when Browning Saturday night accepted without argument or citation of authority a motion by Dudley Tarlton, Jackson's lawyer, for an instructed verdict.'

"The same article said further:

'The jury was kept Saturday night in the courthouse. Sunday morning, following a threat by Browning to keep the jury together until they did sign, the jurymen signed the verdict, appending a statement that they did so against the dictates of their conscience.'

"Affiant would further state that the articles aforesaid, in their entirety and considered together, were calculated and intended to falsely present to the public the nature of the proceedings had, and to compel a different result on the hearing of a new trial; that the said articles falsely stated that Mayes was an ex-insurance man, when in truth and in fact his principal business during the time the said cause was pending was and is in the insurance business.

"The said articles, and all of them, failed to state the terms of the contract declared on by plaintiffs; they failed to state that the check which the defend-

ant Burchard testified he had proffered was tendered seven days late, and that the said check was postdated 30 days from the date tendered, and could not, in consequence, be considered a legal tender of rent money.

"The said articles omitted to state that the arrangements under which the premises were operated had been in existence for some months before the defendant was inducted into the Army. The said articles failed to state the legal grounds upon which plaintiffs' motion for an instructed verdict was urged and granted, but referred to it in a derogatory manner, in quotations, as a 'one-page motion.' That the articles omitted much material evidence that would have enabled the public generally to form a fair estimate of the real nature of the controversy; that the articles failed and omitted the names of the principal plaintiffs, who are highly respected business and professional men of Corpus Christi, Texas; that the articles needlessly repeated and emphasized the fact that the defendant Mayes was in the armed service; that the articles, repeated, reiterated and overemphasized the court's insistence that the verdict be returned in accordance with its instructions; that the articles needlessly repeated, reiterated and over-emphasized the fact that no argument was heard on plaintiffs' motion, and gave no prominence to the fact that defendant's motion for an instructed verdict was argued by defendant's counsel for ninety minutes, and that ruling on that motion was held in abeyance until all the evidence was in.

"That the articles failed to state that the jury had no right to conclude what the law might be upon the proof of any given set of facts, but that they were duty bound to receive the law from the court; that the articles failed to state that the court was under no duty to hear arguments or the citation of authorities from either party, and that remarks of counsel

for the defendants were set forth verbatim and given prominence, while remarks of counsel for the plaintiffs were omitted or given no prominence.

"Affiant would further show the court that these articles, in their entirety and standing alone and together, were wilfully and knowingly written, published and circulated by the persons aforesaid for the purpose of presenting to the reading public by means of false statements, omissions, distortions and over-emphasis, that in its essence the action was one brought by corrupt and unlawful parties to unlawfully, improperly and unjustly deprive a patriotic citizen, unable because of his service to his country, to defend himself, of his rights in and to valuable property, and that counsel for plaintiffs and the court aided and abetted the corrupt parties aforesaid in the furtherance and accomplishment of this purpose, and that the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the plaintiffs, their counsel and the court were in fact corrupt, improper and unlawful.

"Affiant would further show the court that the purpose of this representation to the citizenry of the City of Corpus Christi and County of Nueces was intended and calculated to reflect upon the integrity of the court, and bring it into disrepute and prejudice and influence the court in its ruling on the aforesaid motion for a new trial, and that the said publications and circulations were made for the purpose and with the intent of scandalizing the court, and intended to influence or overawe its deliverations in said pending cause, and were made at a time and under circumstances calculated to affect the force of justice in said proceedings, and were so calculated to do and were intended for that purpose.

"Affiant would further show the court that the said Conway C. Craig, Bob McCracken and Tom

Mulvaney, are, by reason of the said writing, publication and circulation, guilty of contempt of this court.

"It is, therefore, ordered, adjudged and decreed by the court that the said Conway C. Craig, Bob McCracken and Tom Mulvaney be and they are hereby held guilty of contempt as aforesaid, and that they be punished by confinement in the County Jail of Nueces County, Texas, for three days, unless they purge themselves thereof.

"It is further ordered that the said Conway C. Craig, Bob McCracken and Tom Mulvaney be cited by scire facias to appear before said court at the Courthouse in Corpus Christi, Texas, on the 8th day of June, 1945, at 9:30 AM, then and there to show cause why this judgment should not be made final and absolute against them, and that a certified copy of such affidavit and of this judgment be served upon them, together with a copy of such scire facias.

"Joe D. Browning, Judge of the County Court of Nueces County, Texas." (R. 19-27.)

Final Judgment of Contempt

In the final judgment of contempt of August 3, 1945, Judge Browning found

"that the said reports and editorial, considered in their entirety, by reason of inaccuracies contained therein, material matters omitted therefrom, emphasis on matters of evidence adduced at the trial of Cause No. 3624, and the inclusion in said articles and editorial of matters foreign to the record in said cause, were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice and the rights of litigants in cause No. *5095*, to coerce and compel a judgment

contrary to the law and the evidence in said Cause No. *5095* and to block the administration of justice, and that the said news reports and editorial were intended so to do." (R. 81-82.)

Following the finding thus made applicable to the three petitioners the court made three distinct findings, each relating to one petitioner, stating his connection with and responsibility for the publications. (R. 82-83.)

These were followed by a final paragraph adjudging that petitioners are in contempt of court, assessing their punishment at 3 days in jail, and taxing all costs against them. This made final the judgment *nisi*, omitting the "unless they purge themselves thereof" (R. 83).

Judge Browning's View

Aside from those relating to the editorial, the differences between the petitioners and Judge Browning are attributable in large part to their divergent views touching the significance and relative importance of the facts of the detainer suit. As Judge Browning viewed it, when Mayes failed to pay $250 before March 15, 1945, as rent for the first month of the extended term he failed to exercise his option, and his leasehold expired. Obviously, under that view, the bulk of the evidence was irrelevant and of no legal significance. To the layman it seemed important that Mayes, while he was in the army, had been made the victim of an unintentional failure on the part of his agent to pay rent *ad diem*, and that he actually tried and intended to keep his lease in force. Judge Browning failed to perceive that the layman's

view was also the correct view, legally; that, under applicable rules of equity, Mayes was entitled to prevail.

The three petitioners, after presenting their constitutional defenses (R. 27, 43, 62) answered fully. They denied an intent to reflect upon the integrity of the court or to influence the court or that the publications were calculated and intended to affect the course of justice. (R. 34, 50, 69.) They denied and answered specifically and affirmatively each of the charges of false reporting and distortion of the record. (R. 33, 48, 68.) Each attached to his answer exhibits reproducing in full the news accounts and the editorial copied in part in the contempt complaint. (R. 32, 48, 68.) These exhibits, C-26, T-26, C-T-27, C-28, T-28, C-29, T-29, C-30, T-30, and T-31, appear at R. 362-386. Other newspaper accounts (R. 387-418) were not complained of. Indeed, the Court of Criminal Appeals correctly construed the complaint as embracing no published matter other than that set forth in the complaint.

IV.

Specification of Errors

The Court of Criminal Appeals erred:

1. In holding the petitioners guilty of contempt by applying the inapplcable rule of *Toledo Newspaper Co. v. United States*, 247 U. S. 205, and in not applying the Constitution as expounded in *Bridges v. California*, 314 U. S. 252, and *Pennekamp v. Florida*, 90 L. Ed. 1001 (June 3, 1946).

2. In adjudging petitioners guilty of contempt,

notwithstanding the fact that the publications created no clear and present danger of coercing a judge having reasonable fortitude or normal strength of character.

3. In holding that truth of the publications was not a defense to a charge of contemning the court "by means of" false news reports.

4. In upholding a summary punishment for an alleged scandalizing of the court.

5. In refusing to discharge the petitioners since the publications complained of were within the protection of the freedom of the press guaranteed by the 14th and 1st Amendments to the United States Constitution.

V.

Summary of Argument

Point 1. The decision of the Court of Criminal Appeals of Texas upholding the conviction of petitioners for contempt of court has deprived the petitioners of their right of freedom of the press guaranteed by the Fourteenth and First Amendments of the National Constitution as construed by this Court in *Bridges v. California*, 314 U. S. 252 (1941), and in *Pennekamp v. Florida* (No. 473, October Term, 1945, decided June 3, 1946), 66 S. Ct. 1029, 90 L. Ed., Adv. Op., 1001. While acknowledging the binding force of the "clear and present danger" test,

the court below has not applied it, but instead has applied the "tendency" test as announced and applied in *Toledo Newspaper Co. v. United States*, 247 U. S. 402.

Point 2. There was no contempt of court since the publications created no clear and present danger of coercing a judge having reasonable fortitude or normal strength of character.

Point 3. Petitioners were charged with having contemned the court "by means of" false news reports (R. 18; 26). This was the basis of the judgment of conviction (R. 81). In these circumstances the petitioners presented a complete defense by showing that the news accounts were essentially true.

Point 4. The punishment was imposed, at least in part, for scandalizing the court. This vitiates the entire judgment. *Thomas v. Collins*, 323 U. S. 516, 529.

VI.

ARGUMENT

Point I

Petitioners have been deprived of their right of freedom of the press guaranteed by the United States Constitution in that, under the guise of applying the "clear and present danger" test the court below has applied against them the "tendency" test and has decided the case on the theory of Toledo Newspaper Company v. United States, 247 U. S. 402.

Following its statement of facts (R. 418-427) the Court of Criminal Appeals, in answer to the question "Do such publications authorize the contempt judgment," stated that by its own decisions the question is tested by the "reasonable tendency" rule. The Court then quoted from the opinion in *Craig v. Hecht*, 236 U. S. 255, and and a brief portion of the opinion in *Patterson v. Colorado*, 205 U. S. 454, referring specifically to "a publication likely to reach the eyes of a jury" and condemning it on the ground that "it would tend to obstruct the administration of justice." After then referring to the rule said to be announced in 6 R.C.L., p. 508, Sec. 20, that truth is not a defense "when the article tends to impede, embarrass or obstruct the administration of justice," the Court said: "The issue before us is not whether Judge Browning's ruling [in the forcible detainer suit] was correct or incorrect, but whether the publications relating thereto were reasonably calculated to interfere with the due administration of justice in that case." (R. 431.) If by "the issue before us" the Court meant the issue without regard to the National Constitution, the context nonetheless shows that the Court's ultimate disposition of the Federal question was induced by its fixed notions about "the issue before us" as above expressed.

The issue before the Court was approached by first considering and expressing approval of the rule announced in *Toledo Newspaper Co. v. United States*, 247 U. S. 402 (cited at R. 428); in *Craig v. Hecht*, and *Patterson v. Colorado*. Having announced its own adoption of the "reasonably calculated" or "in-

herent tendency" rule, the Court acknowledged its obligation (within limits) to yield to the superior force of this Court's interpretation of the Federal Constitution, as announced in the *Bridges* case. "It becomes necessary, then," said the Court, "to analyze the holding in the *Bridges* case, and, if applicable and controlling, to follow it." (R. 432.)

Having completed the analysis, which the Court had approached on the footing that the *Bridges* decision "is a precedent only in cases involving similar fact situations" (R. 432) the Court rejected the *Bridges case* "as precedent" on the ground that the facts were different. "These fact elements distinguish the *Bridges* case, *supra*, from the instant case and render it uncontrolling, here, on the facts." (R. 435.) "However," said the Court, "the rule of 'clear and present danger,' as announced in the *Bridges* case, *supra*, is controlling here. It is in the light of that rule, then, that we are ultimately to decide this case." *Ibid.* Thus insulated, the Court proceeded to expose itself to the aura of "clear and present danger," uncontaminated by the atmosphere of *Bridges* facts.

Having declared with unconcealed reluctance that it would follow the *Bridges* case "if applicable and controlling," the Court analyzed the facts of that case, and thence proceeded with facility to its conclusions that here there was clear and present danger, and that the degree of imminence was "extremely high." (R. 436.) The Court stated definitely how such conclusions were arrived at, by saying:

"Such conclusions are made manifest because the publications and their purpose were to impress upon Judge Browning (a) that unless he granted the motion for a new trial he would be subjected to suspicion as to his integrity and fairness and to odium and hatred in the public mind; (b) that the safe and secure course to avoid the criticism of the press and public opinion would be to grant the motion and disqualify himself from again presiding at the trial of the case; and (c) that if he overruled the motion for a new trial, there would be produced in the public mind such a disregard for the court over which he presided as to give rise to a purpose in practice to refuse to respect and obey any order, judgment or decree which he might render in conflict with the views of the public press." (R. 437.)

Whence came the basis for such "manifest conclusions? The *Toledo Newspaper* case supplies the answer:

"(a) Because * * * their manifest purpose was to create the impression on the mind of the court that it could not decide in the manner before it in any but the one way without giving rise to such a state of suspicion as to the integrity or fairness of its purpose and motives as might engender a shrinking from so doing. (b) Because the publications directly tended to incite to such a condition of the public mind * * * that if the court, acting according to its convictions, awarded relief, it would be subject to such odium and hatred as to restrain it from doing so. * * * And (d) because the publications were of a character, not merely because of their intemperance, but because of their general tendency, to produce in the popular mind a condition which would give rise to a purpose in practice to refuse to respect any order which the court might render if it conflicted with the supposed rights of the city espoused by the publications." (247 U. S. 414-415.)

It thus appears that while the Court was at pains to point out what were regarded as the distinctive facts of the *Bridges* case, the Court was content to deal broadly and summarily, rather than analytically, with the facts of the present case. In this way the Court fell into the twofold error of assuming the existence of an exact parallel between the present case and the *Toledo* case on the facts, and between the *Toledo* case and the *Bridges* and *Pennekamp* cases on the law.

The court below had previously stated that the *Bridges* decision is not binding as precedent since the facts are different. Specifying, the Court said, first, "No threats are involved in the instant publications." (R. 435.) Whereas it said that in the *Bridges* case the issue turned upon the fact that the publications "carried threats of future adverse criticism and action on the part of the publishers in the event the disposition made in the case was not in keeping with the views of the publisher," all of which the judge might reasonably have expected because of the publisher's well known attitude. (R. 435.) So, we are told in effect that because there were no threats against Judge Browning, the *Bridges* case is "uncontrolling here, on the facts"; and because there were threats against Judge Browning [as in (a), (b) and (c) above, p. 26], there was "clear and present danger" and hence the *Bridges* case is uncontrolling on the law.

Another, although secondary, difference as viewed by the Court, rendering the *Bridges* case "uncontrolling, here, on the facts," is said to be the presence of

public interest in the Los Angeles litigation, whereas, it is said "the public, as such, had no interest in the outcome of" the detainer suit at Corpus Christi. Thus, while absence of public interest at Corpus Christi rendered the *Bridges* case uncontrolling as precedent, still the threat of public revolt if Judge Browning "overruled the motion for a new trial" was a clear and present danger that was "extremely serious" and the degree of imminence was "extremely high." (The threat of such revolt is depicted in (c) above, p. 26.) And so, we are told, the present record is at once devoid of threats and of public interest and suffused with threats, including threat of public revolt.

Support for the Court's explanation of how its conclusions were "made manifest," under the head of (a), (b) and (c) above, p. 26, is not to be found in either the complaint (R. 12), the county judge's findings (R. 81-83), or the articles in context (R. 359-386). If the facts were substantially identical with those in the *Toledo Newspaper* case, authority for the Court's conclusions could be found, in the way above indicated, in the majority opinion in the *Toledo* case, which applied the "tendency" test. (Justices Holmes and Brandeis dissenting.) Even if it be assumed that *Nye v. United States*, 313 U. S. 33, has left in the *Toledo Newspaper* majority opinion a remnant of authoritative precedent, it can hardly be claimed that the Judge Killits conclusions, resting upon the "tendency" doctrine, have survived both the *Bridges* and the *Pennekamp* decisions. Unless it can successfully be so claimed the judgment below is devoid of viable support.

Point 2

The publications created no clear and present danger of coercing a judge having normal stamina or reasonable fortitude.

"The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess any more than it generally can depend on the personal equations or individual idiosyncracies of the tort-feasor." *Pennekamp v. Florida*, 66 S. Ct. at 1038; 90 L. Ed. (Adv. Op.) at 1010.

This principle was not taken into account by the Court of Criminal Appeals.

To say that the publications complained of were dangerous to the administration of justice in the forcible detainer suit is to imply that Judge Browning was seriously wanting in firmness of character or independence. It was not so charged, nor did either of the Texas courts so find, and the record does not show it. Besides, since it is not claimed that petitioners were aware, or sought to take advantage, of any such deficiency or weakness of the judge, the questions at issue are determinable upon the assumption that none existed. Otherwise a given publication about a case will be protected by the Constitution or not, depending upon the strength or weakness of character of the presiding judge. This means that if he is respectably so equipped the Constitution is effective. If not it is ineffective. The Constitution

becomes an inconstant, meaning one thing if a given statement is made about a case pending in one court, and the opposite if made about a similar case pending in an adjoining county, or in another court in the same county.

The complaint charges contempt "by means of" false representations. We deal with that under Point 3, where it seems more appropriate to discuss specifically the news reports. Under the present point we direct attention to the editorial. The single editorial involved, a column entitled The Crow's Nest, is reproduced in full as Appendix A, *post*, p. 54. The part complained of (R. 14-15) and embodied in the judgment *nisi* (R. 22-23) we indicate by italics. The italicized part is of different import from the whole. But the difference is even wider between the natural meaning of the whole and the meaning extracted from it by the court below, as abridged and translated in its opinion (R. 436). This part of the Court's opinion we reproduce as Appendix B, *post*, p. 57. We respectfully submit that the court below has mistaken the meaning of the editorial, and it is apparent that its ultimate conclusion was induced by that obvious misconception, as witness: "The only reason or motive for so doing [attempting to compel Judge Browning to grant a new trial] was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint Judge Browning was wrong and they took it upon themselves to make him change his decision" (R. 436) The editorial itself says the opposite:

"The Lookout, himself a layman, doesn't have the slightest idea whether the decision reached in this particular case is supported by legal authority. There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated." (R. 380, *post*, p. 56.)

First, the editorial advocates two reforms: (a) amendment of an archaic provision of the State Constitution which permits the office of county judge to be occupied by a layman; (b) amendment of the statute conferring upon the county court final appellate jurisdiction of forcible entry and detainer suits. Since leasehold rights, without limit as to value, and irrespective of the duration of the estate, are determinable in that manner, the jurisdiction is neither petty nor simple. Obvious reasons are abundant for thinking that both reforms are overdue. Was the press at liberty, under the Constitution, to select this appropriate occasion to make these constructive suggestions in the public interest? We submit that *Bridges v. California, supra*, at 268, answers in the affirmative.*

Second, the editorial was critical of what the author regarded as a palpable breach by Judge Brown-

*Compare Nelles and King, Contempt by Publication, XXVIII Columbia Law Review, at pages 552, 553: "The important doings of courts are rarely either interesting or intelligible to laymen. The time when they may best command attention is while they are going on. * * * Public discussion outside of court rooms, at such times as it is most likely to command attention, is the nearest we have to a practical means of working for consistent judicial respectability."

ing of the duty resting upon him "to hear the other side." This, we submit, was, in the circumstances, a natural, fair-minded layman's reaction. Defendants' counsel had presented a motion for a directed verdict, upon which the judge had heard extended argument, pro and con, and had later overruled it. Plaintiffs' counsel, at a later stage, presented a motion for directed verdict, when the questions were not identical with those theretofore discussed. The judge refused to hear defendants' counsel in opposition, and granted the motion at once. This action of the judge was characterized in open court by counsel for the defendants as "arbitrary" (R. 213). For this, counsel was not reproved. The court paid no attention to it. We submit that the court was without lawful power to punish summarily the petitioners for saying in the press substantially what, the judge acquiescing, had been said by counsel in open court.

The Court after referring to the publication in the news reports of resolutions passed by groups of citizens, commented that all of this was to show "that by reason of the attitude of the publishers towards Judge Browning's ruling and decision as reflected in the editorials, public opinion had become aroused and was demanding that a new trial be granted in the case because, in agreement with the viewpoint of the publishers, Judge Browning's ruling was wrong." (Appendix B, *post*, p. 58.) The Court has misinterpreted the publishers' attitude "as reflected in the editorials." There was only one. The author of the editorial carefully refrained from taking issue

with Judge Browning's ruling and decision. The statement in the opinion that petitioners demanded a new trial because of their viewpoint that "Judge Browning's ruling was wrong" finds no support in, but is refuted by, the editorial. The writer did criticize Judge Browning's method of conducting the trial. What he said was that he had no idea "whether the decision reached in this particular case is supported by legal authority." Further: "There is no way of knowing whether justice was done." The criticism was pointedly directed to the denial of an adequate hearing, as distinguished from an erroneous result. The writer was explicit in limiting his criticism to the violation of what he described as "the first rule of justice, giving both sides an opportunity to be heard." He stated, both affirmatively and negatively, more than once, that he did not profess to say whether the ultimate decision was right or wrong. The judgment of conviction, based upon an imagined criticism of Judge Browning's decision as being wrong rests upon an utterly mistaken view of the facts.

The Court has read into the editorial an unexpressed warning to the judge that future support would depend upon his reversing his former ruling and deciding the case the other way. The editorial carries no such threat, or effort at persuasion, subtly or otherwise. On the contrary, it tells the judge plainly enough that at all events, regardless of the outcome of the forcible detainer suit, the editorial writer, if opportunity offers, will favor the election of a competent lawyer to the office of county judge. It offers no tempting reward to Judge Browning on

any terms, other than such as might emanate from his own conscience. Was this dangerous to the administration of justice? In principle the *Bridges* and *Pennekamp decisions*, and Justices Holmes and Brandeis in the *Toledo Newspaper* case have answered in the negative.

As for the resolutions adopted by the veterans organizations and kindred groups, it is not charged that these were approved editorially, or that they were misrepresented in the news columns. They expressed the opinion that the defendant, who was in the armed service, had not had a fair trial, and at least one resolution suggested that a new trial be granted and that Judge Browning then recuse himself and let an impartial judge re-try the case. The impression thus expressed accords apparently with that of a number of persons who were present at the trial; as witness the expressions and conduct of the jury in refusing, on Saturday, to sign the verdict as directed by the court *(ante*, p. 7); and was not more critical than were the statements of counsel for defendant made in open court without reprimand or other admonitory action by the court. (R. 217; 374). The sponsors of at least one of these resolutions directed that it be presented to Judge Browning (R. 182), and it was mailed to and received by him (R. 224).

Finally, the interpretation placed by the Court of Criminal Appeals upon the statement made by petitioner McCracken at the end of the contempt hearing in response to the question from the bench as to whether defendants desired to purge themselves is unwarranted. The Court treated the statement as

an admission of an attempt to compel Judge Browning to grant a new trial, in that the petitioner said that he did hope that the editorial would cause the judge to search his conscience, and act with greater care. If this be dangerously subversive, then the area of freedom defined by the lines drawn by the Court in the *Bridges* and *Pennekamp* cases, and by Justices Holmes and Brandeis in the *Toledo Newspaper* case has somehow been contracted. Something did prompt the judge to hear argument on the motion for new trial (R. 209). Finally, the Court's interpretation of the single expression lifted from the context of the McCracken statement is another example of the way in which petitioners have been victimized by that process throughout. For convenient reference we reproduce the whole of the statement as Appendix C, *post*, p. 58.

Point 3

Petitioners having been convicted of contempt "by means of" allegedly false news reports, they presented a complete defense by showing that the news accounts were essentially true.

The judgment *nisi*, after reproducing abstracts from the newspapers, charged that the articles, all together, "were calculated and intended to falsely represent to the public the nature of the proceedings had, and to compel a different result on the hearing of a new trial." This was immediately followed by specifications of allegedly false statements, omissions and overemphasis. Then, that "these articles,

in their entirety and standing alone and together, were wilfully and knowingly written, published and circulated by the persons aforesaid for the purpose of presenting to the reading public *by means of false statements, omissions, distortions and overemphasis*, that in its essence the action was one brought by corrupt and unlawful parties to unlawfully, improperly and unjustly deprive a patriotic citizen, unable because of his service to his country, to defend himself, of his rights in and to valuable property, and that counsel for plaintiffs and the court aided and abetted the corrupt parties aforesaid in the furtherance and accomplishment of this purpose, and that the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the plaintiffs, their counsel and the court were in fact corrupt, improper and unlawful." (R. 26.) (Our emphasis.)

Obviously, the false statements, omissions, distortions and overemphasis so referred to were those which had been specified immediately before in R. 24-25. (Copied in full *ante*, pp. 16-18.) The part of the complaint above quoted is immediately followed by the concluding paragraph of the complaint, this single sentence:

"Affiant would further show the court that the purpose of this representation to the citizenry of the city of Corpus Christi and County of Nueces was intended and calculated to reflect upon the integrity of the court, and bring it into disrepute *and prejudice and influence the court in its ruling on the aforesaid motion for new trial*, and that the said publications

and circulations were made for the purpose and with the intent of scandalizing the court, and intended to influence or overawe its deliberations in said pending cause, *and were made at a time and under circumstances calculated to affect the force of justice in said proceedings*, and were so calculated to do and were intended for that purpose." (Then follows immediately the *nisi* judgment of guilt. R. 26. Our italics.)

The Court of Criminal Appeals has lifted from the last quoted paragraph the italicized parts, and, by recombining them with others, similarly extracted from other paragraphs, has reconstructed what it designates a single charge, selected, so it says, from "various reasons whereby it was claimed that the articles mentioned constituted contempt of court." The so-called single charge discussed by the court is thus stated: "that the articles when taken together and considered as a whole 'were calculated and intended to falsely present to the public the nature of the proceedings had and to compel a different result on the hearing of the motion for a new trial' and to 'prejudice and influence the court in its ruling on the aforesaid motion for a new trial * * * and were made at a time and under circumstances calculated to affect the force of justice in said proceedings * * *.'" (The omissions are the Court's not ours.) (R. 424.)

The county judge interpreted the complaint, in accord with our understanding of it as above stated, as charging contempt of court "by means of," or, as he expressed it, "by reason of" false reports. He found that the reports and editorial, "by reason of"

inaccuracies, omissions, emphasis and inclusion of foreign matters, were "of a nature calculated to" accomplish the alleged wrong as specified by him. (This basic finding (R. 81) is quoted in full in the Statement, *ante*, p. 19.)

The Court of Criminal Appeals declined to consider the defense that the newspaper articles were substantially true. We recognize that truth is not a complete defense invariably. For example, no one would be permitted to apprise a jury by extra-legal means of prejudicial facts not in evidence. But this case does not fall within any such exception. Here, it was charged that the offense was committed "by means of" a false report to the public of the facts of the trial.

Charges of False Reporting Are Answered by the Record

As briefly as can be done we answer from the record the specific charges of false reporting.

(a) The first is *that it was falsely stated that Mayes was an ex-insurance man whereas insurance was his principal business.* (R. 24-25.) It is hard to see how or why it was wrong to refer to Mayes incidentally in the news accounts as "an ex-insurance man"; instead of saying that insurance was his principal business. He did testify that in addition to the Playboy Cafe he owned an insurance business. (R. 228.) What had happened to it when he joined the army or that it was his "principal business" is not

shown by the record. The charge, we submit, is frivolous.

(b) The next charge is that the articles "*failed to state the terms of the contract declared on by the plaintiffs.*" (R. 25.) Obviously, this referred to the provision of the contract which the court construed as conditioning the option on payment of the first month's rent of $275 in advance. The applicable provisions of the contract were repeatedly referred to in the news accounts. For example, in the Caller-Times of May 27 (Exhibit C-T-27): "The option clause gave Mayes the right to continue at the location for another year at a monthly rental of $275, but Burchard said he had never seen a copy of the lease and was unaware of its provisions for a rental increase." (R. 365.) In substance, the statement was repeated in The Caller of May 28. (R. 370.)

(c) Next is a charge of omission, namely, that *the papers failed to state that the second check tendered by Mayes' agent was tendered seven days late and was postdated 30 days, and for that reason was not legal tender.* (R. 25.) No issue of technical legal tender was involved. The evidence showed without dispute that the so-called postdating of the check was due to inadvertence. (R. 263-264.) It showed, moreover, that the check was not rejected on that ground. Besides, Burchard had testified that on March 19 (before he forwarded the check of March 21) and when for the first time he saw a copy of the lease, he offered to complement the $250 check by paying the additional $25. (R. 294.) The record shows without dispute that if the March 21 check had been so dated

plaintiff would not have accepted the money at that time (R. 315) and that his failure to pay the required amount before that date, in Judge Browning's view, defeated his rights. (R. 210.) Considering the equities, neither the tardiness nor the postdating of the check defeated Mayes' rights.

(d) The meaning of the next charge, that said articles *"omitted to state that the arrangements under which the premises were operated had been in existence for some months before the defendant Mayes was inducted into the Army"* (R. 25), is obscure. If it had reference to "the arrangements" between Mayes and his agent Burchard, the answer is that the Times of Saturday, May 26, 1945, reported: "While Mayes did not go into the Army until a few months ago, Burchard testified he held power of attorney to act for the Army private since May 22, 1944." (R. 361.)

(e) A number of answers are available to the next charge, that *"said articles failed to state the legal grounds upon which plaintiffs' motion for an instructed verdict was urged and granted, but referred to it in a derogatory manner, in quotations, as a 'one-page motion'."* (R. 25.) There is nothing in the record to show that the court had explained, so that a layman could understand it, "the legal grounds" on which his instructions to the jury were based. The record does show that he failed to make this plain to the jury. Of course, the extraordinary, if not unique, dissension between judge and jury was the most striking circumstance of the evening, and

could have accounted for the omission of less dramatic facts. As for the second half of the charge, that the motion was referred to in a derogatory manner as a "one-page motion," this was a direct quotation of remarks of counsel, "Do I understand that your Honor is going to arbitrarily grant Mr. Tarlton's one-page motion, without argument?" (R. 213.) It is not shown that the court reproved, or otherwise took notice of the statement by counsel.

(f) Considering the fact that petitioners were charged with a criminal offense, the part of the complaint charging that "*the articles omitted much material evidence that would have enabled the public generally to form a fair estimate of the nature of the controversy*" (R. 25), is too general to require answer. The mental reactions of the jury, as manifested by their unmistakable conduct, furnished convincing, if not conclusive, evidence of the view that would have been taken by the public generally if they could have had the fullest possible information about the case and the trial. The petitioners were certainly under no duty to present the case in a different light from that which would have been reflected by a complete disclosure of all that took place at the trial.

(g) The charge next in order, that "*the articles failed and omitted to name the principal plaintiffs, who are highly respected business and professional men of Corpus Christi, Texas*" (R. 25), is without merit. Dr. Heaney and the Messrs. Flato, to whom this referred, were nominal plaintiffs, as part owners of the building, but with no real interest in the

controversy (R. 310, 311): It was not shown that they knew anything about the way that Mayes was being treated or were in any way to blame for it. To the layman it was apparent that the contest was between Mason and Mayes.

(h) Juxtaposed to the charge last above quoted was this: *That the articles were published for the purpose of presenting to the reading public "by means of false statements, omissions, distortions and over-emphasis, that in its essence the action was one brought by corrupt and unlawful parties to unlawfully, improperly and unjustly deprive a patriotic citizen of his rights in and to valuable property, and that counsel for plaintiffs and the court aided and abetted the corrupt parties aforesaid in the furtherance and accomplishment of this purpose, and that the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the plaintiffs, their counsel and the court were in fact corrupt, improper and unlawful."* (R. 26.) The facts did show that Mayes was badly treated. If the press accounts left the impression that this was by corrupt persons, it was because they substantially tracked the testimony, much of which was hearsay, obtruded into the case by the judge himself.

For example: "Mr. Tarlton: We object to that as hearsay. The Court: I am sure the jury would like to know how do they know these things." (R. 324.) Again: Witness: "He told me then—", the hearsay objection being repeated, the court ruled: "I am asking the questions. What else, who else?" (R. 325.)

Again: "Mr. Tarlton: We object to all of that as hearsay. A. The Judge just asked me to tell it. Mr. Lewright: The Judge asked these questions. The Court: I am asking the questions. What else. Who else? Mr. Lewright: Wait a minute. The Court: Just a minute. I am asking the questions. Mr. Lewright: I want him to finish that conversation. The Court: Oh, all right. A. Mr. Cott stated to me, 'You are smart enough to know what you are up against, and they will do as they did at San Antonio.' He says, 'You know what happened up there. That man was shot and nobody arrested for it and accused of killing him. That is what occurred, and when Doc Mason and his partner—'" (R. 325-326.)

Both counsel having concluded their examination of Burchard, the court took him over: "The Court: Just a minute, Mr. Burchard. This Court would like to know a little more about why you didn't go before the grand jury. A. I went to the foreman of the grand jury, Mr. DeWitt McGee and told him that I had a lot of information that I would like to present to the grand jury as to the gambling interests of Doc Mason, that I have in my possession, a list of 100 places in which Doc Mason is conducting and elsewhere gambling, slot machines, poker games, dice games and policy rackets where he conducts a numbers racket, and I told Mr. McGee, the foreman of the grand jury, that I would like to know if he would be willing to go with me before Judge Westervelt and frankly tell the Judge our story and ask permission of the Judge to have one or two investigators to get out and get the information relative to these places and present it to the grand jury. The Court: What

did Mr. McGee state? A. He said he would go with me before Judge Westervelt. The Court: Did you go before Judge Westervelt? A. No, I didn't. The Court: Why?" (R. 331-332.) Again, overruling an objection that the cross-examination as to collateral matters was inadmissible even for impeachment, the court said: "I think the jury is entitled to all the facts, and I feel that I brought some of these points out and I think that the plaintiffs have the right to go in and cross-examine the witness." (R. 333.) Finally, he ruled that all of the testimony about gambling was hearsay, and instructed the jury to disregard it. (R. 334.) It was patently hearsay when at the inception the objection on that ground was overruled. This belated interdiction imposed no ban upon the press; and the court proceedings, excursive matter included, were reported as they occurred (R. 365-366; 368-369).

We add that the record is simply devoid of support for the charge that the articles were published for the purpose of inducing the belief that the actions "of the plaintiffs, their counsel and the Court were in fact corrupt, improper and unlawful." Nor does the record furnish any support for the charge that the published articles had any such effect. As petitioners stated at the end of the contempt hearing, they at no time imputed bad motives to the judge.

The treatment of Mayes is indefensible. Both he and Burchard had informed Jackson, and after Mayes had gone into the army, Burchard had informed Mason, that they desired to remain in the building. Mayes so stated to Jackson in December, 1944 (R. 253, 254); and he closed the cafe during

Christmas week while he spent $400 in renovating. (R. 255-256.) Burchard first informed Jackson of their desire to keep the building and later so advised Mason, who was the real party at interest. (R. 262, 352.) We take up the next charge:

(i) *"That the articles needlessly repeated and emphasized the fact that the defendant Mayes was in the armed service."* (R. 25).

This was perhaps the most newsworthy single fact in the case. Beyond question, advantage was taken of his absence. This would have had a different significance if the absence had been voluntary, but it was not. It was potentially enforced by the power of the National Government.

The sufficiency of the action taken in exercising the option; the effect of the failure to pay in advance the full amount of the rent; none of the important facts in the case could be properly appraised without taking into account Mayes' absence in the Army.

The court was wholly unwarranted in summarily punishing the petitioners for not playing it down.

(j) The next charge: *"That the articles repeated, reiterated and over-emphasized the court's insistence that the verdict be returned in accordance with its instructions."* (R. 25.)

It is hard to see how this could have been contemptuous, even if it had been played up as charged. The complete answer is that the parties have stipulated that the accounts of what took place in court relating to that occurrence, as presented in the Caller-Times of Sunday, May 27, and in the Caller

of Monday, May 28, are "substantially correct." (R. 217.) The stipulation was approved by Judge Browning (R. 225).

(k) *"That the articles needlessly repeated, reiterated and over-emphasized the fact that no argument was heard on plaintiff's motion, and gave no prominence to the fact that defendant's motion for an instructed verdict was argued by defendant's counsel for ninety minutes, and that ruling on that motion was held in abeyance until all the evidence was in."* (R. 25.)

The above charges are not supported by the record. In the Caller-Times of Sunday, May 27th, it was stated that in support of defendant's motion for directed verdict, "The defense counsel argued for close to 90 minutes—" (R. 369). Again, in the Caller of May 28th, it was stated "At the close of the testimony, Saturday night, Dudley Tarlton presented a motion for a directed verdict for the plaintiff. Lewright had presented a similar motion for the defendant earlier in the day on which argument continued for an hour and a half." (R. 371.)

Here was a case of which the County Court had final jurisdiction. It *was* unusual to refuse to hear defendant's argument against the plaintiff's motion for directed verdict. Full argument had been permitted on the earlier motion, but the issues were different. The law questions arising on the two motions were not identical; nor were the facts.

Why should the County Judge (layman or lawyer) refuse to hear argument before taking such a case from the jury? To be sure, the Judge has a

discretion in such matters. But his great power in a case where he is the final arbiter should prompt him to exert equally great care to avoid abusing it. We respectfully submit that to any fair-minded layman it would appear that in the circumstances the Judge should not have acted summarily on the motion, *refusing to hear* defendant's answer to it.

Finally, as we have pointed out in answer to a related charge, counsel, in open court, characterized the court's action in granting the motion without argument as *arbitrary*. This brought no reprimand from the court. The court had no license to punish summarily the news men for not playing it down.

(l) *"That the articles failed to state that the jury had no right to conclude what the law might be upon the proof of any given set of facts, but that they were duty bound to receive the law from the court."* (R. 25.) The record refutes the charge. The Caller of Monday, May 28, carried the statement that Mr. Lewright, counsel for defendant, told the jury on Sunday morning, that "*under the law*" Judge Browning had the right to compel them to sign the verdict. (R. 373.) Again, in the Times of Tuesday, May 29, the newswriter stated that the Judge "exercised a *legal right* to order the jury to find a verdict for the plaintiff." (R. 377.)

(m) In what we have said we have answered the next charge: *"That the articles failed and omitted to state that the court was under no duty to hear arguments or the citation of authorities from either party."* (R. 25).

(n) This brings us to the only remaining charge: *"That remarks of counsel for the defendants were set forth verbatim and given prominence, while remarks of counsel for the plaintiffs were omitted or given no prominence."* (R. 25).

Presumably, the reference is to the "remarks" made following the court's announcement that he would instruct the verdict for the plaintiff. This, naturally, evoked protest from counsel for defendant, and hardly called for remarks by counsel for plaintiff. In the ensuing proceedings it appears that compliance of the jury required the help of counsel for defendant, who, on Sunday morning, to avoid having the jury kept in custody until Monday, or later, appealed to the jury to obey the court's instructions. His remarks were reported in full, or substantially so, in the Monday Caller. They were effective in accomplishing what the Judge had failed to accomplish. The occasion for them, their content, and the results produced by them combined to make them newsworthy.

Finally, the stipulation says that the accounts as published in the Caller-Times of Sunday and the Caller of Monday, including the reports of the "speeches and statements addressed to the jury and to the court by Walter M. Lewright, counsel for defendants, and B. D. Tarlton, counsel for the plaintiffs, and statements and remarks made by Joe D. Browning, County Judge, to the members of the jury and counsel," *"are substantially correct."* (R. 217.)

As Judge Beauchamp's opinion suggests (R. 443-444) Judge Browning's notion that petitioners had published a misleading report of the trial of the de-

tainer suit was induced by his erroneous conception of the controlling question of law in that case. He thought that, perforce a forfeiture provision for non-payment of monthly rental in advance, such failure to make timely payment put an end to the lease. He erroneously gave to such forfeiture clause the effect of a provision marking the duration of the estate granted (R. 210). Besides, there had been no demand for payment of rent; and in the absence of refusal to pay, after demand, forfeiture for non-payment of rent would not lie. *Gray v. Vogelsang* (Tex. Civ. App.), 236 S. W. 122 (1921).

Under Judge Browning's view of the law, the dispute could have been ended in a brief pre-trial conference, or the case could have been tried in less than an hour instead of consuming two days. This, for the reason that it was undisputed that the full amount of the monthly rental was not paid on the day when due. But it was undisputed that the default was caused by a mistake, and contributed to by the misleading conduct of others. In the circumstances equity would allow no such forfeiture. *Benavides v. Hunt*, 79 Texas 383; *Randolph v. Mitchell* (Tex. Civ. App.), 51 S. W. 297; *Creamery Dairy Co. v. Electric Park Co.* (Tex. Civ. App.), 138 S. W. 1106; *Mettier v. Osborn*, 146 Mass. 399; *Gordon v. Richardson*, 185 Mass. 492; *Cole v. Johnson*, 120 Iowa 667. Besides, under Texas law, the covenant for rent was not effective to limit the term or duration of the estate. *Waggoner Estate v. Sigler Oil Co.*, 118 Texas 509.

This shows that Judge Beauchamp (R. 443-444) was right in concluding, also, that the conviction of

contempt was not sustained since it was predicated upon a charge that the newspaper articles "by reason of inaccuracies, * * * were of a nature calculated * * * to coerce and compel a judgment contrary to the law and the evidence" (R. 81).

Freedom of the press, as restricted by the decision below, means that a news reporter incurs the risk of summary punishment if he fails to interpret and report the facts of the trial in accord with the notions of the trial judge concerning the controlling questions of law. Under that abridged liberty, if the reporter, acting in good faith, interprets the facts in a way that fails to vindicate the trial judge's conclusions of law, he may be laid by the heels for contempt. This would not make allowance for reasonable differences of opinion in appraising the facts. It would fall far short of allowing "the widest range compatible with the essential requirement of the fair and orderly administration of justice" (*Pennekamp v. Florida*, 66 S. Ct. at 1037; 90 L. E. (Adv. Op.) at 1009), or "the broadest scope that could be countenanced in an orderly society." *Bridges v. California*, 314 U. S. at 265.

Point 4

The element of the judgment which imposes punishment for scandalizing the court vitiates the entire judgment.

In the judgment *nisi* petitioners were found guilty of contempt on the ground, *inter alia*, that "said publications and circulations were made for the purpose and with the intent of scandalizing the court * * *

(R. 26). For this they were sentenced to serve three days in the county jail "unless they purge themselves thereof" (R. 26). In the final judgment of the county court petitioners were adjudged guilty of contempt because "said reports and editorial, considered in their entirety, by reason of the inaccuracies, * * * were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice and the rights of litigants in Cause No. 5095 [the forcible detainer suit] * * *" (R. 81). Motion for new trial in the detainer suit was overruled on June 6, 1945 (R. 209). The judgment *nisi* in the contempt proceedings was rendered on June 4, 1945 (R. 19). The final judgment in the contempt proceeding was rendered in August, 1945 (R. 83), after the judgment in the detainer suit had become irretrievably final at a former term of court (R. 81). At the end of the contempt hearing, and before judgment was pronounced, the county judge inquired whether the petitioners desired to purge themselves of contempt. (See stipulation, *post*, p. 60.) In response to such inquiry the McCracken statement was made to the court, which he introduced by explaining that he did not know what was meant by purging in a case of that kind. The entire statement is in Appendix C, *post*, p. 58.

If Judge Browning was not satisfied with the McCracken statement (adopted by the other petitioners) it is obvious that what he wanted was retraction and apology. The judge's willingness to accept at that date such a purging reveals his interest in an expiation of the so-called scandalizing offense,

and renders apposite this question by Mr. Justice Holmes, taken from his dissenting opinion in *Craig v. Hecht:* "how can it be pretended that the charge obstructed the administration of justice when the judge seemingly was willing to condone it if the petitioner would retract?" (263 U. S., at 281.) This Court held unanimously in the *Bridges* case that scandalizing the court is not, *per se*, contempt of court or summarily punishable as such. 314 U. S. at 270; 287.

There were not two separate penalties, one for supposedly obstructing justice and the other for scandalizing the court. There was a single sentence of imprisonment for scandalizing the court and attempting to obstruct justice. Even if, contrary to fact, it be assumed that the record supports the latter, the entire judgment is vitiated by the penalty for scandalizing the court. *Thomas v. Collins*, 323 U. S. 516, 529.

Conclusion

The *Toledo Newspaper* criticisms, winding up "Impeach Killits," as weighed by Justices Holmes and Brandeis, fell short of "anything that would have affected a mind of reasonable fortitude." 247 U. S. at 425; quoted in *Bridges* case, 314 U. S. at 278. It is submitted that there was no clear or real danger that a judge who measured up to the same external standard would be overawed by the newspaper articles complained of here. It is impossible to think of an effective intimidation of the judge by these articles

without having in mind a judge who fails to satisfy respectable judicial standards, in point of character.

Petitioners respectfully pray that the judgment of the Court of Criminal Appeals be reversed with directions that the petitioners be discharged from custody.

Respectfully submitted,

MARCELLUS G. ECKHARDT,
P. O. Box 909,
Corpus Christi, Texas;

CHARLES L. BLACK,
IRELAND GRAVES,
P. O. Box 1073,
Austin, Texas,

Counsel for Petitioners.

APPENDIX A

"The Crow's Nest"

"Judge and Jury"

"The week-end incident in county court lends force to a frequently made argument that the judge should be a lawyer. A layman occupying its bench is bound to end up in hot water sooner or later when he is sitting on a case where fine points of law are argued. Probably the basic fault lies with the Texas constitution and statutes which vest judiciary authority in a county judge but which do not require the occupant of the office to be an attorney. The office is filled, not only in Nueces, but in many other Texas counties, by a layman.

The incident around which the present controversy rages involves such a case. Bush M. Jackson, agent, employed a technicality in seeking to break the lease of Pvt. Joe L. Mayes of the United States Army on a ground floor location in the old Elks Club building where Mayes operated a cafe. Mayes contends that his lease is still in force.

The case was heard by a jury before County Judge Joe D. Browning. Expert counsel represented the principals. About the only knowledge that Browning, a layman, has with court procedure has been gained during his occupancy of the office. Obviously, he has an even more sketchy knowledge of the points of law which opposing attorneys were arguing.

Yet he instructed the jury to return a verdict for the plaintiff. The jury twice ignored his orders and decided for the defendant. Only when the defend-

ant's counsel advised its members that they were obliged to follow the judge's instruction did they comply, and then with a notation that they were violating their conscience.

One-Sided Opinion

Browning's behavior and attitude has brought down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such goings on, especially when a man in the service of his country seems to be getting a raw deal.

But that's not the point. A better objection to the judge's decision deals with a more fundamental issue.

When the testimony was in, the defense counsel offered a motion for an instructed verdict for his client. He was required, as is the custom, to give his authority, and arguments against were made by the plaintiff's attorney. The judge overruled the motion after hearing both sides.

Then the plaintiff's counsel offered a motion for an instructed verdict for his client. It was granted immediately, without having him cite his authority or without giving the defendant's attorney a chance to argue against it.

That was the travesty on justice, the judge's refusal to hear both sides. That's where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high handed procedure in instructing a jury. It's no wonder that the jury balked and public opinion is outraged.

Knowledge Essential

The fact that a serviceman is involved lends drama to the event. But it could have happened to anyone, it can happen to anyone, with a layman sitting as judge in a case where fine points of law are involved. True, the idea that only lawyers are qualified to occupy most public offices has been run into the ground, and in most instances a competent layman would be better qialified, but the county judge's office is an exception. He should be a competent attorney as well as a competent businessman.

It's the tragedy in a case of this sort that the court where the controversial decision was handed down is the court of last resort. It's too bad that appeal can't be made to a district court and heard by a judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly.

The Lookout, himself a layman, doesn't have the slightest idea whether the decision reached in this particular case is supported by legal authority. *There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated.*

He only knows that respect for the court's ability to mete out justice has been badly shaken, a result that can make for a dangerous condition. Qualified jurists must occupy our benches. Men of conscience must be encouraged to sit on our juries.

This column is written for the Caller by Bob McCracken. Opinions expressed are those of the writer and do not necessarily reflect the policy of this news

paper." (R. 378. Italics indicate the part copied in the complaint, R. 14-15, and in the opinion of the Court of Criminal Appeals, R. 421-422.)

APPENDIX B

[The part of the opinion of the Court of Criminal Appeals which interprets and appraises the above editorial, Appendix A.]

"When the several publications in the instant case are considered together and in their chronological order of appearance, there is no escape from the conclusion that it was the purpose and intent of the publishers thereof to force, compel, and coerce Judge Browning to grant Mayes a new trial. The only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint, Judge Browning was wrong and they took it upon themselves to make him change his decision. To accomplish that end, Judge Browning's action in instructing the jury, without hearing argument on the motion, was editorially denounced as a 'travesty on justice' and 'high handed'; as properly bringing 'public opinion down on his head'; as outraging 'public opinion'; as a 'tragedy' that the case could not be appealed to another judge who was 'able to interpret and weigh motions and arguments of opposing counsel and to make his decisions accordingly'; and as a repudiation of the 'first rule of justice,' as a consequence of which 'there is no way of knowing whether justice was done.'

"Following, and in connection with, the editorials,

news items were published showing that a certain group of citizens had passed a resolution denouncing the decision as a 'gross miscarriage of justice.' Other news items followed, showing that three different groups of citizens were petitioning or circulating petitions calling on Judge Browning to grant Mayes a new trial in the case and to permit the case to be re-tried by another judge'—all to show that by reason of the attitude of the publishers toward Judge Browning's ruling and decision, as reflected in the editorials, public opinion had become aroused and was demanding that a new trial be granted in the case because, in agreement with the viewpoint of the publishers, Judge Browning's ruling was wrong.' (R. 436.)

APPENDIX C

[Statement made by McCracken (concurred in by the other petitioners) at the end of the contempt hearing, in response to the question by Judge Browning as to whether they desired to purge themselves. See copy of stipulation, following this Appendix; original on file with clerk of this Court.]

"I can speak only for myself. Without knowing the meaning of purging a contempt, especially in a case of this kind, and not being guilty of any contempt as I concede [conceive], I can only say this:

I think that the impression created upon the mind of the public by all that was said in our papers about the Jackson-Mayes trial was the same impression

that would have been created upon the minds of an average intelligent layman who sat through the trial. It was the same impression that would have been created if the entire proceedings could have been published. In saying this, I do not impute unworthy motives to anyone; I do not undertake to judge motives.

Moreover, I do not profess to know or presume to advise how the case should have been finally decided. It was my hope that the Crow's Nest published in the papers would quicken the conscience of the judge. I wanted him to search his conscience. It was my hope that what I said would make him more careful in discharging his duty. I think my column was calculated to have that effect upon a conscientious judge.

As I saw it then, and as I see it now, the statements in the papers could not have the effect of overthrowing the will or undermining the conscience of the judge. They could have no such effect upon any judge worthy of the name. I assumed that the judge would understand that he, and he alone, would have to decide the law as he understood it.

I would not bring our courts into disrepute. Indeed, in the long run, their standing before the bar of public opinion is determined by the courts—and by them alone—but I would do what I can to help them always to perform their high and solemn duties.

If, in this instance, I have gone about it in a way that has needlessly wounded sensibilities, I am sorry for that, but I do not concede [conceive] that anything that I have done gives your honor license to punish me for it." (R. 425.)

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 241

CONWAY C. CRAIG, BOB MCCRACKEN AND TOM MULVANY, *Petitioners*,

vs.

JOHN B. HARNEY, SHERIFF OF NUECES COUNTY, TEXAS

STIPULATION

The parties stipulate that the statement of petitioner McCracken (R. 425) was made at the end of the contempt hearing in response to Judge Browning's inquiry from the bench at that time, as follows: "Do the respondents care to purge themselves?"

Dated this 6th day of November, 1945.

IRELAND GRAVES,
Counsel for Petitioners;

JERRY D'UNGER,
Counsel for Respondent.

ATTORNEY GENERAL OF TEXAS
By Harris Tolar, First Assistant,
Counsel for Respondent

(Original Stipulation on file with Clerk of this Court.)